

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 25 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Deployment of Wireline Services)

Offering Advanced Telecommunications)
Capability)

CC Docket No. 98-147

COMMENTS OF THE
COMPETITION POLICY INSTITUTE

Ronald Binz, President and Policy Director
Debra Berlyn, Executive Director
John Windhausen, Jr., General Counsel

Competition Policy Institute
1156 15th St. NW Suite 520
Washington, D.C. 20005

3773 Cherry Creek North Drive
Suite 1050
Denver, CO 80209

September 25, 1998

No. of Copies rec'd
List ABCDE

0+4

SUMMARY

CPI favors the rapid deployment of advanced telecommunications capability and believes that the best way to promote the roll-out of such new services is to promote competition for these services in the least regulatory manner possible. Policy makers must confront the dilemma of how to ensure that new competitive carriers can obtain what they need of the local telephone network, at prices they can afford, while also ensuring that ILECs have incentives to deploy these same new services to consumers.

The "separate affiliate" option, under the correct conditions, could be help to promote the competitive availability of advanced services. The Commission must exercise great caution, however, to ensure that the ILEC does not attempt to "end-run" its obligations under section 251 by transferring assets or functions out of the ILEC and into the affiliate simply to avoid regulation. Some ILECs have expressed concern that it will be too costly for them to operate a separate affiliate. If true, the separate affiliate option may do little to encourage some ILECs to expand their offerings in the advanced services market on a widespread basis. In addition, ILECs may still take action to favor their affiliate as long as they have a common ownership interest.

Because there are doubts about the efficacy of the separate affiliate approach, we believe the Commission should consider establishing an additional means by which the ILECs could obtain reduced regulation of their advanced service offerings. This second route would entail forbearance of some existing Commission requirements on pricing services, unbundling of some network elements and on resale requirements. Such forbearance would be carefully tied to actions by the ILECs to comply with greater collocation and unbundling requirements and the existence of effective competition in the advanced services marketplace.

CPI suggests that the ILEC should eventually be permitted to provide advanced services on a partially deregulated basis without the creation of a separate affiliate if it fully complies with the requirements to provide greater collocation and subloop unbundling to competitive carriers (and whatever other requirements the FCC finds to be necessary). The Commission will recognize these combined approaches as analogous to the combined Computer II and Computer III decisions.

**COMMENTS OF THE
COMPETITION POLICY INSTITUTE**

The Competition Policy Institute (CPI)¹ appreciates the opportunity to submit comments in this proceeding concerning advanced telecommunications capability. CPI submitted comments previously on the petitions filed by several Bell Operating Companies (BOCs) for regulatory relief under section 706. In those earlier comments, we urged the FCC to act with caution and gather more evidence about the developing technologies and the state of competition in advanced services markets before considering whether to grant the regulatory relief requested by those BOCs. We are pleased that the FCC has done exactly that by denying the petitions and initiating this Notice of Proposed Rulemaking (NPRM).

CPI favors the rapid deployment of advanced telecommunications capability and believes that the best way to promote the roll-out of such new services is to promote competition for these services in the least regulatory manner possible. It is, of course, almost a truism to say that competition, relying on market forces, is the best means of promoting the deployment of new technologies and advanced services. Competition stimulates greater investment, innovative service offerings, and lower prices.

Opportunities for the competitive provision of advanced telecommunications

¹ CPI is an independent, non-profit organization that advocates policies to promote competition for telecommunications and energy services in ways that benefit consumers. Complete information about CPI is available on our web site at <www.cpi.org>.

services should be extended to the incumbent local exchange carriers as well as to emerging competitors. The incumbent local exchange carriers (ILECs) can bring enormous talent, experience and resources to this market. The Commission is correct to seek means to accentuate, and not blunt, incentives for the ILECs to deploy these new services. At the same time, today's competitors to the incumbent carriers are generally not in a position to deploy telephone lines ubiquitously to all potential subscribers; they must use pieces of the ILEC networks in order to reach the consumer.

Thus, policy makers must confront the dilemma of how to ensure that new competitive carriers can obtain what they need of the local telephone network, at prices they can afford, while also ensuring that ILECs have incentives to deploy these same new services to consumers. This is essentially the same issue the Commission dealt with in its section 251 interconnection proceeding with respect to local exchange service and exchange access service, applied to advance services.

In its Notice, the Commission proposes one method of accomplishing this goal — allowing the ILECs to offer advanced services using a separate affiliate that purchases interconnection to the local telephone network in the same manner as any other competitor. This proposal may provide the ILECs with the opportunity to participate in the advanced services market, free of some of the regulations that might arguably lessen their incentives and abilities to deploy advanced services. In other words, this arrangement might successfully replicate the conditions that these carriers would face in a competitive marketplace. In addition, by placing the

ILEC's affiliate in the same position as potential competitors, the ILEC may have increased incentives to make interconnection with its network open and available to all competitors.

The "separate affiliate" option, under the correct conditions, could help to promote the competitive availability of advanced services. The Commission must exercise great caution, however, to ensure that the ILEC does not attempt to "end-run" its obligations under section 251 by transferring assets or functions out of the ILEC and into the affiliate simply to avoid regulation. The Commission should not allow the ILEC to transfer loops, switches, trunks, or other components of the basic local exchange network to the affiliate. Transfer of these assets would allow the affiliate to step into the shoes of the incumbent local carrier, thereby essentially undermining the open market provisions of the Commission's Local Competition Order. Under these strict conditions, CPI believes that allowing an affiliate of the ILEC to provide advanced services could stimulate their deployment by giving the ILEC a way to participate in the market without handicapping it simply because of its affiliation with the ILEC.

While CPI could support the creation of a separate affiliate under strict terms, we must also admit that the separate affiliate proposal may, in some cases, fall short of what is needed to serve both incumbents and competitors. In fact, it may create new barriers to successful deployment of advanced services by raising the cost (or eliminating efficiencies) of their provision by ILECs. Simply put, some ILECs have expressed concern that it will be too costly for them to operate a

separate affiliate. If true, the separate affiliate option may do little to encourage some ILECs to expand their offerings in the advanced services market on a widespread basis.

On the other hand, we share the concern of some competitors that the separate affiliate may not operate as a truly independent entity. As long as the ILEC has an equity ownership interest in the separate affiliate, the ILEC that owns the telephone network will retain the incentives to give superior treatment to the advanced services affiliate. For instance, the ILEC could provide certain forms of interconnection and operations support systems (OSS) that are needed by its affiliate while failing to provide the type of interconnection and OSS needed by other competitors. Because the process of providing interconnection to competitors is highly technical and occurs on a case-by-case basis, discrimination is difficult to detect and police under any circumstances. While the separate subsidiary requirement may make improper cross-subsidization easier to spot, it does not remove the occasion of abuse. These infirmities are similar to those CPI raised in its comments on the proposal of LCI to create a separate subsidiary option and a “fast track” to section 271 approval.²

It is difficult to judge, *in the abstract*, whether the ILECs will be able profitably to provide deregulated advanced services through a completely separate affiliate, accompanied by all of the necessary conditions. We are not in a position to

² See, Petition of LCI Telecom Corp. For Declaratory Rulings, CC Docket No. 98-5, CPI Comments, March 23, 1998.

assess the ILECs' arguments about the effects on their cost structure that a separate affiliate requirement will have. Ultimately, only a marketplace trial will succeed in answering the question.

Because there are doubts about the efficacy of the separate affiliate approach, we believe the Commission should consider establishing an additional means by which the ILECs could obtain reduced regulation of their advanced service offerings. This second route would entail forbearance of some existing Commission requirements on pricing services, unbundling of some network elements and on resale requirements. Such forbearance would be carefully tied to actions by the ILECs to comply with greater collocation and unbundling requirements and the existence of effective competition in the advanced services marketplace.

In its Notice, the Commission proposed several means of ensuring that competitors have greater access to collocation, the ILEC's local loops, and resale of the ILEC's services. CPI does not here provide specific comment on the details of these proposals, except to say that additional clarification of the ILECs' obligations on these issues are increasingly important to the ability of CLECs to provide competitive service.

CPI's principal suggestion is that the FCC should state in the order in this docket that it will strongly consider regulatory relief for the ILEC upon its implementation of whatever additional requirements the Commission decides to impose upon the ILEC in this proceeding. CPI suggests that the ILEC should be permitted to provide advanced services on a partially deregulated basis without the

creation of a separate affiliate *if* the ILEC fully complies with the requirements to provide greater collocation and subloop unbundling to competitive carriers (and whatever other requirements the FCC finds to be necessary). Under these conditions, the ILEC might, for example, be able to provide advanced services without the resale obligation of section 251(c)(4), and might not be required to unbundle such elements as the digital subscriber line access multiplexer (DSLAM) to competitors as a separate unbundled network element.

This approach would address the concerns raised by ILECs that the resale and unbundling rules (together with forward-looking pricing) discourage their investment in data services. On the other hand, this approach would require that such deregulation occur only when an ILEC's actions and marketplace realities together yield an effectively competitive market.

There are two reasons to examine a "second track" proposal such as this. First, it could speed the deployment of advanced data services by both the ILECs and the CLECs. The ILEC would be subjected to less regulation; the CLEC would be able to get access to the essential elements of the ILEC network that it needs to provide competitive service. Second, this proposal gives the ILEC greater incentives to make collocation and sub-loop unbundling available. Viewed either as a *quid pro quo* or as an additional "carrot", the ILEC would be more likely to comply with these greater network opening requirements if satisfaction of these requirements were linked to specific regulatory relief.

The Commission will recognize these combined approaches as analogous to

the combined *Computer II* and *Computer III* decisions. In *Computer II*, the Commission allowed the ILECs (then primarily under the control of AT&T) to enter the enhanced services market through a separate subsidiary. This is analogous to the separate affiliate requirements proposed by the Commission in its Notice. In the *Computer III* decision, the Commission allowed the ILECs to provide enhanced services, still integrated with their telephone operations, once the ILEC had an approved "open network architecture" (ONA) plan in place. The theory was that the ILEC could not discriminate against competing providers of enhanced services if the ESP could obtain the same network elements as the ILEC provided to itself.

CPI stresses that a key element in this second track approach is the matching of regulatory relief with actions by the ILECs and developments in the advanced services marketplace. The following table *illustrates* one way in which market conditions could be matched with regulatory policy changes:

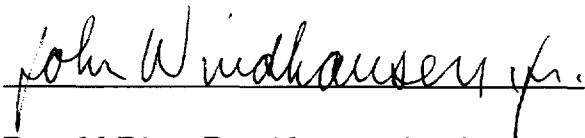
Condition or Requirement	Possible Policy Change
Network elements (e.g., DSLAMs) are sufficiently available from competitive sources that they are deemed not "necessary", <i>and</i> conditions such as sub-loop unbundling and enhanced collocation are fully implemented so as to enable actual UNE-based competition for xDSL services.	Exemption of network elements that are sufficiently available and no longer "necessary" from unbundling requirements.
DSL services (and competing services) are provided by competing providers through UNEs and separate facilities in an effectively competitive marketplace	Price regulation and tariff requirements are removed for interstate xDSL services provided by ILECs.

A competitive market exists for the provision of advanced services on a wholesale basis to resellers.

Resale pricing requirements of section 254(c)(3) are removed for advanced services; resale requirements of section 251(b) are retained.

The forgoing chart is meant to be illustrative only and does not include all of the detail that may apply. CPI recognizes that a proposal such as that outlined above is highly dependent upon information (such as the status of availability of DSLAMs) that will be obtained in response to the Commission's NPRM. For that reason we plan to supply greater detail to the proposal outlined in these opening comments after reviewing the comments of other parties to this case. Once again, we appreciate the opportunity to comment as the Commission undertakes this most important issue.

Respectfully Submitted,



Ronald Binz, President and Policy Director
Debra Berlyn, Executive Director
John Windhausen, Jr., General Counsel

Competition Policy Institute
1156 15th St. NW Suite 310
Washington, D.C. 20005
202 835-0202
202 835-1132 (fax)

3773 Cherry Creek North Drive
Suite 1050
Denver, CO 80209

Certificate of Service

I, Bridget J. Szymanski, hereby certify that on this twenty-fifth day of September, 1998, copies of the foregoing Comments of the Competition Policy Institute were served by first-class, United States mail, postage prepaid, upon each of the following:


Bridget Szymanski
Office Manager

Secretary
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M St., NW Room 544
Washington, DC 20554

ITS
1231 20th St., NW
Washington, DC 20036

Carol Matthey
Policy Division
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

Kathryn Brown
Common Carrier Bureau
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

William E. Kennard
Chairman
Federal Communications Commission
1919 M St., NW
Room 814
Washington, DC 20554

Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
1919 M St., NW
Room 802
Washington, DC 20554

Susan Ness
Commissioner
Federal Communications Commission
1919 M St., NW
Room 832
Washington, DC 20554

Gloria Tristani
Commissioner
Federal Communications Commission
1919 M St., NW
Room 826
Washington, DC 20554

Michael Powell
Commissioner
Federal Communications Commission
1919 M St., NW
Room 844
Washington, DC 20554